

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 01-04488
)	Chapter 7
MICHAEL MacKENZIE)	
McPHERSON,)	
)	
Debtor.)	
_____)	
)	Adv. Pro. No. 02-00021
MICHAEL MacKENZIE)	
McPHERSON,)	
)	
Plaintiff,)	
)	
vs.)	
)	
EDUCATIONAL CREDIT)	
MANAGEMENT CORPORATION,)	
)	
Defendant.)	
_____)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial of this adversary proceeding was held on December 8 and 17, 2003, with closing arguments on February 13, 2004. Plaintiff Michael MacKenzie McPherson represented himself, and Theodore C. Young represented defendant Educational Credit Management Corporation (“ECMC”).

The parties stipulated orally to some of the facts at the commencement of trial. Based on the stipulated facts and the evidence presented at trial, the court makes the following:

FINDINGS OF FACT

1. Plaintiff Michael M. McPherson is a well-educated, single, fifty-seven year old attorney who currently resides and practices law on the island of Hawaii. He has no dependents. He was born and raised in Hilo, Hawaii, and his family has a long history in the islands.

2. Mr. McPherson attended Punahou School and graduated from Kailua High School. He earned Bachelor of Arts and Masters degrees in English from the University of Hawaii in 1974 and 1976, respectively.

3. After receiving his Masters degree, he taught English (composition/writing) for a semester at Maui Community College. He later left that position to work at Maui Concrete & Aggregates as a lab technician for over eight years (from 1977 to 1985). In this position, he eventually assumed the responsibility of running the company's lab. His duties included the design of concrete and the monitoring of crusher operations for the aggregates. After his employment at Maui Concrete, he was briefly employed by the State of Hawaii, Department of Transportation, as an inspector. He was subsequently hired by

Hawaiian Bitimuls, which was a subsidiary of Dillingham Construction Pacific along with Hawaiian Dredging, as a concrete technician, with a salary of about \$2,500 to \$3,000 per month.

4. Mr. McPherson is a published author. He first published his poetry in an anthology called *Poetry Hawaii*, which was published by University of Hawaii Press. He has regularly published his poetry (in mostly local journals) since 1979. Between 1981 and 1983, he was also involved in the publication of a small literary magazine in Maui called *Hapa*. His publications can be found in major university libraries, including the University of California at Berkeley. He is also the author of a novel, called “Rivers of the Sun,” which was published in the year 2000. This novel was used in courses at the University of Hawaii at Manoa. Occasionally and sporadically, he receives small honoraria for appearances regarding his publications.

5. Mr. McPherson decided to attend law school. He entered the Lewis & Clark Law School in Oregon in 1988 and graduated with a J.D. in 1991. While at Lewis & Clark, Mr. McPherson was a member of the Environmental Law Journal. He published law review articles in the area of environmental law for the Lewis & Clark Environmental Law Journal and for the University of California at Berkeley.

6. Mr. McPherson financed his law school education with the consolidated student loans that are now held by ECMC. As of the time of his voluntary bankruptcy petition, he owed ECMC, on his consolidated student loans, the total amount of \$116,102.74, which includes the principal amount of \$86,842.94, plus interest at the rate of 9 percent per annum (\$6,427.26), and costs as allowed by law in the amount of \$22,832.54. Interest continues to accrue at the per diem rate of \$16.16. Mr. McPherson has made several payments on his student loans totaling \$3,642.53. He also received payment forbearances on his student loans in 1992, 1994, 1995, 1996, 1997, 1998, and 1999. He has not made any loan payments since September 2000. Mr. McPherson does not dispute the amounts owed under his student loans.

7. Upon graduation from law school, Mr. McPherson returned to Hawaii and was admitted to the Hawaii bar in 1991. He was employed as a full-time law clerk in Maui with former Judge John McConnell of the Second Circuit Court, State of Hawaii, for about one year, from 1991 to 1992. Thereafter, he was associated for about six months with the Maui law firm of Lowenthal, August & Graham, where he assisted attorney Philip Lowenthal with criminal defense matters, including hearings, arraignments, and the drafting of appellate briefs.

Mr. McPherson's employment with the Lowenthal firm was terminated when that firm dissolved following Hurricane Iniki.

8. At about this time, Mr. McPherson applied for positions as an attorney with the Maui County Corporation Counsel, the Office of the Public Defender on Maui, and the Hawaii County Corporation Counsel. None of the applications were successful.

9. In 1993, Mr. McPherson worked as a contract attorney for James Sogi, Esq. in Kona, Hawaii, for \$25.00 per hour. This employment was terminated after three months.

10. Mr. McPherson then opened his own solo law practice in Waimea, Hawaii, which he has operated from about 1993 through the present. His primary area of practice is criminal defense. Mr. McPherson litigated one criminal case on retainer during 1993, and began accepting court appointments to represent indigent defendants on misdemeanor charges in the District Court of the Third Circuit in South Kohala and Hamakua. In about 1994, Mr. McPherson began to receive court appointments (through Circuit Court Judge Ibarra) to represent indigent criminal defendants in felony cases, for which he is paid \$40 per hour (out of court) to \$60 per hour (in court). He also has private clients whom he charges about \$150 per hour. Most of the cases for his private clients involve criminal

misdemeanors, traffic offenses, and DUI matters. He has received a few appointments as a foreclosure commissioner (again from Circuit Court Judge Ibarra), but he has not received such an appointment since 2000.

11. Mr. McPherson has successfully defended clients against serious criminal charges. His success in the courtroom, however, has not led to economic success.

a. On June 22, 1994, Mr. McPherson borrowed \$50,000 from the Office of Hawaiian Affairs (“OHA”) to set up an office in Waimea Town Plaza. On November 22, 1995, Mr. McPherson borrowed another \$15,000 from OHA. Both loans were secured by equipment, furniture, fixtures, receivables and general intangibles. A substantial portion of the loan money was used on office overhead expenses. Mr. McPherson never repaid the loans. OHA commenced a collection action but dismissed it without prejudice after Mr. McPherson filed his chapter 7 petition.

b. In about 1994, Mr. McPherson began borrowing money from First Hawaiian Bank in Waimea, where family friend Harold Hughes was branch manager. At the time this borrowing began, Mr. McPherson and Mr. Hughes believed that McPherson’s practice would grow, enabling Mr. McPherson to repay the loan. In 1997 and 2000, Mr. McPherson refinanced

his indebtedness to First Hawaiian Bank and pledged his automobile (a 1992 Ford Ranger pickup truck) as collateral. The loan has not been repaid and is in default. First Hawaiian Bank has never repossessed the vehicle, presumably because it has little value.

c. In 2002, Mr. McPherson was evicted from his office in Waimea Town Plaza. He now practices out of his residence. The rent for his residence is three months in arrears; he has avoided eviction because he has a good relationship with the landlord and the dwelling is in such bad condition that the landlord would have difficulty finding another tenant.

d. Mr. McPherson is delinquent in the payment of state and federal taxes. He received an Internal Revenue Service Notice of Intent to Levy on Certain Assets dated October 10, 2003, and has been in communication with collection officers of the IRS. A Certificate of State Tax Lien for 2002 was filed in the Bureau of Conveyances on November 4, 2003. Mr. McPherson pays \$50.00 per month to the State Tax Director by agreement with the State Tax Office for state taxes past due.

12. The following table lists Mr. McPherson's gross business income and his net income after business expenses, based upon his tax returns and Statement of Financial Affairs:

<u>Calendar Year</u>	<u>Gross Income</u>	<u>Net Income</u>
2002	\$ 34,339	\$ 18,355
2001	\$ 29,626	\$ 15,308
2000	\$ 42,708	\$ 25,702
1999	\$ 39,029	\$ 29,720

In other words, the net income out of which he must pay his living expenses has averaged approximately \$1,875 per month.¹ This average monthly income probably overstates his future income potential because his income has generally fallen over the last four years and will probably continue to fall due to his health problems (discussed below). This average monthly income is consistent with representations that Mr. McPherson recently made to the IRS, under penalty of perjury, in an attempt to negotiate a payment plan with the IRS. Mr. McPherson told the IRS that his gross income (presumably after business expenses) for the months of July, August, and September 2003 was \$1,006, \$1,450, and \$1,776, respectively, or an average of \$1,411 per month.

¹ In his Schedule I, filed on November 16, 2001 (with the petition which commenced his chapter 7 case), Mr. McPherson stated that his monthly income was \$2,500, but that “Income varies depending on volume and disposition of cases in litigation. Occasionally as high as \$5,000 per month and sometimes as low as \$4,000 per month.” Mr. McPherson’s tax returns demonstrate that his estimate of his income in Schedule I was too optimistic.

13. In his Schedule J, filed on November 16, 2001 (with the petition that commenced his chapter 7 case), Mr. McPherson stated that his monthly expenses, not including any payment on his student loans, were \$2,138.00. Mr. McPherson represented to the IRS that his living expenses (not including student loan payments) for July, August, and September 2003 were \$1,906, \$1,927, and \$1,985, respectively, or an average of \$1,939 per month. Mr. McPherson maintains a frugal, minimal standard of living. He could not reduce his expenses and still live at a minimal standard. The rent for his residence is in default. He cannot afford to pay for ordinary and necessary medical care, such as dental work and vision care, let alone the expenses precipitated by his health problems. His income is not sufficient to cover all of his necessary expenses, even if he makes no payment on the student loans.

14. The only significant unpaid fee that Mr. McPherson might collect in the near future arises out of a civil matter involving alleged Hawaii Revised Statutes Chapter 480 claims (unfair trade practices) and breach of contract claims. Mr. McPherson handled that matter on a 10 percent contingency fee, with his client paying all costs. Mr. McPherson recently settled the case for \$50,000. As of the date of this trial, the defendant has defaulted and has paid only \$30,000 of the settlement amount, and Mr. McPherson has received only part of his fee. If

and when the defendant pays the rest of the settlement amount, Mr. McPherson will receive the remaining balance of the contingency fee.

15. Mr. McPherson suffers from severe and permanent health problems that impair, and will continue to impair, his ability to earn a living and that substantially increase his necessary living expenses.

a. While he was in law school, Mr. McPherson began to experience bouts of dizziness, nausea, and lightheadedness. He ignored these symptoms during law school and his tenure with Lowenthal, August, and Graham. They became more severe during 1993 and 1994.

b. In 1994 or 1995, Mr. McPherson made an appointment to see Jed A. Groom, M.D., a physician in Waimea, Hawaii, whom Mr. McPherson had known during childhood. Dr. Groom told Mr. McPherson that Mr. McPherson had a significant heart abnormality that likely evidenced a prior heart attack. His condition continued slowly to deteriorate.

c. On March 9, 2001, Mr. McPherson began to feel ill while in court. His condition was bad enough that the presiding judge, Judge Ibarra, noticed that Mr. McPherson was having difficulties. He went to the doctor and was hospitalized in the critical care unit with congestive heart failure. Dr. Groom referred Mr. McPherson to Dr. Gurtler at the Queen's Medical Center for an

angiogram. Dr. Gurtler told Mr. McPherson that he had had a “natural bypass” and that medications rather than surgery were the appropriate treatment. Mr. McPherson now takes at least eight different medications every morning.

d. While attempting to travel to Honolulu to attend the initial trial set in this case, Mr. McPherson became nauseous and fainted at the Kona airport. He was taken to the emergency room at the Kona Community Hospital. On arrival, his blood pressure was alarmingly low. He recovered slowly from this bout. Judge Ibarra was aware of his condition and concerned for his ability to complete assignments, so Judge Ibarra did not assign any cases to Mr. McPherson for several months. Judge Ibarra resumed doing so in June 2003, after Mr. McPherson’s condition somewhat improved.

e. Mr. McPherson continues to suffer from dizziness and fainting spells, especially when under stress. His doctor has told him that he suffers from coronary artery disease, congestive heart failure with cardiomyopathy, chronic atrial fibrillation, chronic venous stasis disease and foot pain, hyperuricemia/gout, and depression. His symptoms include weakness, lack of energy, forgetfulness, pain, dizziness, and lightheadedness.

f. Mr. McPherson’s health problems are chronic and will likely continue as long as he lives. On his good days, Mr. McPherson can function

effectively as a trial lawyer and sometimes can even go surfing. On his bad days, however, Mr. McPherson cannot function. Sadly, it is likely that Mr. McPherson will have fewer good days and more bad days as time passes.

16. Mr. McPherson is the subject of several complaints before the Office of Disciplinary Counsel. In one case, the Hawaii Supreme Court suggested that he might have provided ineffective assistance of counsel. In other instances, Hawaii County prosecutors complained because Mr. McPherson reacted angrily after he felt that police and prosecutors had not lived up to agreements they had made with him. The complaints have not been resolved. The pendency of the complaints makes it difficult for Mr. McPherson to obtain employment as a lawyer. The outcome of these complaints could affect Mr. McPherson's ability to practice law.

17. In an effort to increase and stabilize his income and obtain a better health insurance plan, Mr. McPherson has diligently but unsuccessfully sought employment both inside and outside the legal profession. In about 1999, Mr. McPherson applied for a position teaching English at Hawaii Preparatory Academy. Mr. McPherson received no response. In 2001, Mr. McPherson applied for work at the Hawaii County Office of Corporation Counsel. Corporation Counsel Lincoln Ashida informed Mr. McPherson that nothing was available.

Also in 2001, Mr. McPherson applied for work as in-house counsel for Bonded Materials Company. President Jeff Deer informed Mr. McPherson that the position was not available. In April 2003, Mr. McPherson responded to a newspaper advertisement and applied for a position as Social Worker IV in the State of Hawaii Judiciary. Mr. McPherson received notice in May 2003 that he lacked the necessary experience. In August 2003, Mr. McPherson responded to a newspaper advertisement and applied for a position as Social Worker III in the State of Hawaii Judiciary. Mr. McPherson received notice in September 2003 that he lacked the necessary experience. In October 2003, Mr. McPherson responded to a newspaper advertisement and applied for a position as Social Worker I in the State of Hawaii Judiciary. In November 2003, Mr. McPherson received a deadline request to furnish college transcripts to prove 12 credits in Social Sciences courses to show eligibility for a Social Worker I position. Mr. McPherson searched the website for the University of Hawaii, where he earned a B.A. in 1974.

Mr. McPherson found that some departments currently offering Social Sciences curricula were not in existence when he was in college, and, therefore, he probably would not be able to meet this requirement. Mr. McPherson could not return to his career in the construction and concrete industry because he is not able to do heavy physical work.

18. Mr. McPherson is a annuitant or beneficiary of the George Galbraith Trust (the “Trust”). The Trust’s assets consist primarily of securities worth about \$50,000,000 and real estate worth \$20,000,000 to \$25,000,000. The Trust enjoyed gross income during 2002 of about \$1,870,000. Mr. McPherson’s share of that income, however, was less than \$10. The Trust will terminate by its terms on April 26, 2007. Even after the termination date, however, the Trust will not make a substantial distribution until the conclusion of likely litigation to determine who is entitled to share in the Trust and how the assets are to be divided. Whether Mr. McPherson will receive any significant distribution from the Trust, how large that distribution might be, or when he might receive it, is impossible to determine at this time. Because of these uncertainties, Mr. McPherson’s interest in the Trust has no ascertainable value at this time.

Based on these findings of fact, the court makes the following:

CONCLUSIONS OF LAW

1. Section 523(a)(8) provides that:

A discharge [in a chapter 7 case] . . . does not discharge an individual debtor from any debt –

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an

educational benefit, scholarship, or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8).

2. Mr. McPherson's debt to ECMC is of the kind which section 523(a)(8) generally excepts from the discharge.

3. In order to establish undue hardship under section 523(a)(8), the debtor bears the burden of proving that (a) the debtor cannot maintain, based on current income and expenses, a minimal standard of living for the debtor and the debtor's dependents if forced to repay the loans, (b) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans, and (c) the debtor has made good faith efforts to repay the loans. In re Pena, 155 F.3d 1108, 1112 (9th Cir. 1998), citing In re Brunner, 831 F.2d 395 (2d Cir. 1987). The debtor's burden is stringent. The debtor must show more than merely tight finances and more than garden-variety hardship.

4. The court can discharge a student loan obligation in part, so long as the debtor carries the burden of proving that payment of the discharged part would impose an undue hardship. In re Saxman 325 F.3d 1168 (9th Cir. 2003).

5. Based on his current income and expenses, Mr. McPherson cannot maintain a minimal standard of living if he is forced to repay any part of the ECMC loans. He lives frugally and does not incur any unnecessary or unreasonable expenses. His income does not even permit him to pay all of his necessary living expenses, including the substantial medical bills caused by his serious health problems.

6. Additional circumstances exist which clearly indicate that Mr. McPherson's financial and medical situation will persist for a significant portion of the repayment period of the student loans. Mr. McPherson's health problems will almost certainly persist as long as he lives and will prevent him from increasing his income or reducing his expenses.

7. Mr. McPherson has made a good faith effort to repay his loans. He has made some payments on the loans and sought deferments that ECMC (or its predecessors) granted for many years. He has made reasonable efforts to increase and stabilize his income so that he could make some payments on the student loans, but he has been unsuccessful. His discretionary expenses are minimal and could not be reduced.

8. There is a possibility that Mr. McPherson will receive a substantial amount of money from the Trust at an unknown date after the Trust

terminates in 2007. (Because the likelihood, amount, and date of such a distribution is entirely uncertain, Mr. McPherson's interest in the Trust has no ascertainable value at this time.) Neither the parties nor the court have found any authority on the issue of whether section 523(a)(8) permits the court to discharge a debtor from a student loan obligation except to the extent that the debtor receives money from a particular source in the future. The reasoning of Saxman suggests that a partial discharge of this kind is permissible. In Saxman, the court observed that an all-or-nothing approach to discharge under section 523(a)(8) "contravenes Congress' intent in granting bankruptcy courts equitable authority to enforce the provisions of the Bankruptcy Code." 325 F.3d at 1174. To ignore an asset like the Trust, which could make Mr. McPherson a wealthy man, would be inequitable. To require Mr. McPherson to make current payments based upon his interest in the Trust would be equally inequitable because that interest does not have any value at this time, does not produce any significant current income, and may never produce any money for Mr. McPherson. In order to balance these competing equities in a manner consistent with section 523(a)(8), Mr. McPherson's liability to ECMC shall be discharged except to the extent that he receives a distribution from the Trust, either before or after the Trust terminates.

9. If section 523(a)(8) does not authorize a partial discharge of the kind described in the preceding paragraph, Mr. McPherson's debt to ECMC should be discharged in its entirety because, based on his current situation, he has carried his burden under the Brunner test.

DATED: Honolulu, Hawaii, March 1, 2004.

 */s/ Robert J. Faris*
United States Bankruptcy Judge